

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TUAN NGOC NGUYEN**

Claimant

VS.

**IBP, INC.**

Self-Insured Respondent

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Docket No. 253,745

**ORDER**

Claimant requested review of the December 22, 2003 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on July 13, 2004.

**APPEARANCES**

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At the regular hearing, the parties stipulated claimant suffered accidental injury arising out of and in the course of his employment on September 23, 1999. At oral argument before the Board, the parties agreed that claimant suffered a series of repetitive traumas through September 23, 1999, at which time claimant received restrictions and was placed on light-duty work. Accordingly, that date was stipulated by the parties as the date of accident.

**ISSUES**

The disputed issue was the nature and extent of disability. Specifically, whether claimant was entitled to a whole body disability as a result of injuries to both his left shoulder and his neck, or limited to a scheduled disability to the left shoulder.

The Administrative Law Judge (ALJ) found the claimant suffered a 17 percent permanent partial scheduled disability to the left shoulder.

Claimant requested review and argues that the Board should adopt the opinions of Drs. Douglas M. Rope and Peter V. Bieri that claimant suffered permanent impairment to his cervical spine as well as his left shoulder. Consequently, claimant requests the Board

determine that he suffered a whole body impairment. Claimant further argues that he is entitled to a work disability (a permanent partial disability greater than the percentage of his functional impairment) because he demonstrated a good faith effort to return to work for respondent but was physically unable to perform the jobs he attempted. Claimant concludes that he is entitled to a 100 percent work disability.

Respondent argues claimant did not complain of neck pain until approximately a year after the stipulated accident date and at that time claimant was performing a light-duty job cleaning belts. Respondent further argues the physicians who examined and treated claimant at that time concluded the neck complaints were not related to claimant's work activities. Consequently, respondent requests the Board affirm the ALJ's finding that claimant's disability is limited to a 17 percent permanent partial scheduled disability to the left shoulder.

If it is determined claimant suffered a whole body impairment, the respondent argues claimant did not make a good faith effort to return to accommodated work with respondent. Consequently, respondent argues claimant should be limited to his functional impairment. If it is determined claimant is entitled to a work disability, the respondent argues claimant did not make a good faith effort to obtain appropriate employment and a wage should be imputed to claimant. Respondent concludes claimant would be entitled to no more than a 36.5 percent work disability.

The sole issue raised on review by the claimant is the nature and extent of disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant emigrated from Vietnam to the United States on September 28, 1998, and began working for respondent on December 28, 1998. The claimant was employed to perform a job described as bagging rounds. The job required moving pieces of meat that weighed from eight to ten pounds from one belt to another. The meat would then be placed into bags.

Claimant described a gradual onset of pain in his left shoulder. Finally, claimant notified respondent on September 17, 1999, that he had pain in his left shoulder. Claimant was referred to Dr. J. Rob Hutchison for treatment. Dr. Hutchison noted claimant complained of left shoulder pain and diagnosed left acromial clavicular joint strain. The doctor assigned work restrictions, prescribed medication and scheduled a follow-up examination.

Upon receiving Dr. Hutchison's restrictions, the respondent placed claimant in the light-duty position of cleaning belts on September 23, 1999.

Dr. Hutchison provided additional treatment consisting of a corticosteroid injection into the acromial clavicular joint as well as medication. On November 4, 1999, Dr. Hutchison referred claimant to Dr. David M. Beard for an orthopedic consultation.

Dr. Beard examined claimant on November 29, 1999. The claimant complained of left shoulder AC joint pain with no pain elsewhere. The examination revealed claimant had good motion in his neck with no areas of tenderness.<sup>1</sup> After reviewing x-rays of claimant's left shoulder, Dr. Beard diagnosed left shoulder acromial clavicular pain with early arthritis. Dr. Beard provided conservative treatment including physical therapy. Because claimant's shoulder pain persisted, Dr. Beard, on February 14, 2000, recommended a left shoulder distal clavicle excision. On May 23, 2000, Dr. Beard performed arthroscopic subacromial decompression with left distal clavicle excision on claimant's left shoulder.

At claimant's follow-up visits with Dr. Beard after surgery the claimant continued to complain of left shoulder pain. By August 17, 2000, the claimant continued to complain of left shoulder discomfort but did not voice complaints regarding his neck. However, Dr. Beard reviewed x-rays of claimant's cervical spine to determine if there was evidence of any disease processes that would be contributory to claimant's ongoing left shoulder discomfort. The doctor noted claimant had some degenerative disk disease in the neck. As a result the doctor placed claimant on a cervical spine self-care program.

At his September 18, 2000, office visit with Dr. Beard the claimant complained of neck pain. Dr. Beard ordered an MRI of claimant's cervical spine and referred claimant for a consultation with Dr. Michael L. Smith regarding claimant's cervical spine. The MRI of claimant's cervical spine was conducted September 26, 2000.

Dr. Michael L. Smith, a board certified orthopedic surgeon, examined claimant on October 25, 2000, to analyze his cervical spine complaints and determine what if any treatment was needed. Upon examination the claimant complained of neck discomfort down into the left shoulder and arm. Although claimant had some neck complaints with full neck flexion the exam was otherwise normal. Claimant had full range of motion without any particular area of tenderness. X-rays revealed early degenerative changes in the cervical spine. An MRI of the cervical spine also confirmed degenerative changes. After his examination of claimant, the doctor did not recommend any treatment other than over the counter anti-inflammatory medication.

Claimant returned to see Dr. Beard for follow-up visits on November 6, 2000, and January 8, 2001, with continued complaints of left shoulder pain. At his final visit with Dr.

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<sup>1</sup> MacMillan Depo., Ex. 6.

Beard on March 8, 2001, the claimant continued to complain of left shoulder pain. Dr. Beard concluded that he had no further treatment to offer claimant but suggested that because of claimant's continued left shoulder complaints a second opinion should be obtained regarding the possibility of additional left shoulder surgery.

A functional capacities evaluation was conducted on January 2nd, and January 4, 2001. The testing indicated inconsistency of effort as well as self-limiting behavior. The evaluator concluded that she was unable to assess claimant's maximum functional capabilities because of claimant's poor effort and self-limiting behavior.

The respondent referred claimant to Dr. Jeffrey T. MacMillan, a board certified orthopedic surgeon, for a second opinion regarding claimant's continuing left shoulder complaints. Dr. MacMillan first examined claimant on April 19, 2001, and diagnosed claimant with multi-level cervical spondylosis in his neck as well as left shoulder pain. Cervical spondylosis is the same as cervical arthritis. X-ray as well as MRI confirmed claimant had mild degenerative disk changes at C3-4 and C4-5 without any evidence of disk herniation.

Dr. MacMillan provided conservative treatment consisting of cervical traction and a Tens unit as well as physical therapy. Claimant was also provided injections in the left shoulder and was referred for epidural steroid injections in the cervical spine. At his last examination of the claimant on August 30, 2001, Dr. MacMillan noted claimant had no limitation in his cervical range of motion. The doctor concluded the claimant's neck pain was caused by cervical spondylosis and although he offered a repeat shoulder procedure the claimant declined further surgery. Dr. MacMillan rated claimant at 7 percent to the left upper extremity and 5 percent to the whole person for the neck. Converting and combining those percentages results in a 9 percent whole person functional impairment. Dr. MacMillan concluded claimant's neck pain was not related to work activities performed up to September 23, 1999.

Dr. Smith had diagnosed claimant with arthritis, degenerative cervical spondylosis. Dr. Smith opined that the repetitive trauma that led to claimant's treatment for his left shoulder did not produce any permanent injury to claimant's cervical spine. Nor would claimant's repetitive work activities have permanently aggravated that arthritic condition.

At his attorney's request, the claimant was examined by Dr. Douglas M. Rope, board certified in internal medicine, on October 25, 2001. Claimant's chief complaint was shoulder discomfort. Dr. Rope recommended that claimant avoid reaching above shoulder level with the left hand as well as repetitive pushing or pulling. The doctor further assigned lifting restrictions of 20 pounds occasionally, 10 pounds frequently with the left arm. Dr. Rope provided a 27 percent rating to claimant's left upper extremity which he converted to a 16 percent whole person functional impairment. Dr. Rope rated claimant in DRE Cervicothoracic Category II at 5 percent. Combining the whole person ratings results in a 20 percent permanent partial functional impairment.

Dr. Rope initially indicated claimant had a rotator cuff tear but admitted that Dr. Beard's operative report indicated the rotator cuff was in good condition. There was a wide disparity in the shoulder range of motion findings on claimant's FCE as compared to Dr. Rope's findings and the doctor agreed his impairment rating for the shoulder would have been lower if he used the FCE values. Dr. Rope agreed that he did not know what work claimant was performing when he developed cervical complaints and further agreed that without knowing what work claimant was performing he could not with any degree of medical certainty form an opinion that claimant's work activity caused cervical injury. The doctor assumed that the same activities that injured claimant's shoulder caused claimant's cervical problems.

At his attorney's request, the claimant was examined by Dr. Lynn A. Curtis, board certified in physical medicine, rehabilitation and spinal cord injury, on March 18, 2002. Dr. Curtis diagnosed claimant with post left shoulder decompression with loss of range of motion and left shoulder abduction weakness. And claimant had a cervical spine musculoligamentous injury with some loss of cervical range of motion. Dr. Curtis rated claimant's cervical spine at 5 percent and his upper extremity at the shoulder at 11 percent which converted to a 7 percent whole person functional impairment. The whole person ratings combine for a 12 percent permanent partial functional impairment.

Dr. Peter V. Bieri conducted an independent medical examination of the claimant on December 9, 2002, at the ALJ's request. Dr. Bieri noted claimant did not report cervical pain until an August 17, 2000, office visit with Dr. Beard. Dr. Bieri agreed that delay in reporting the symptom for approximately a year would make it more likely than not that the symptom was not related to the injury. The doctor rated claimant with a 17 percent impairment to the left upper extremity or 10 percent whole person. The cervical spine was rated at 5 percent whole person impairment. The combined whole person impairments results in a 15 percent. Dr. Bieri concluded the neck was related to claimant's work based upon his understanding the claimant developed neck complaints simultaneously with his left shoulder complaints. But Dr. Bieri agreed that he did not know what work claimant was performing when he first complained of neck pain.

Initially, it must be determined whether claimant suffered a scheduled injury to the left shoulder for which his entitlement to benefits would be pursuant to K.S.A. 44-510d(a)13 or whether he also suffered permanent impairment to his neck for which his entitlement to benefits would be pursuant to K.S.A. 44-510e. The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.<sup>2</sup> It is the situs of the disability, not the situs of the trauma, that determines which benefits

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<sup>2</sup> K.S.A. 44-510d (Furse 2000); K.S.A. 44-510e (Furse 2000).

are available.<sup>3</sup> If the situs of the disability is to the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, the disability is considered a scheduled disability.<sup>4</sup>

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.<sup>5</sup>

The ALJ concluded that claimant's neck was not injured as a result of claimant's work activities. The ALJ made this determination in part because claimant did not complain of neck pain and injury until approximately one year after the date he last performed work without restriction. And the ALJ noted the contemporaneous examination by Dr. Smith revealed claimant suffered from degenerative changes in the cervical spine that were neither caused nor aggravated by the work activities that led to claimant's left shoulder treatment.

Claimant initially complained of left shoulder pain. During the treatment provided by Dr. Hutchison, the claimant only complained of left shoulder pain. He was then referred for additional treatment for his left shoulder with Dr. Beard. The claimant received treatment for his shoulder from Dr. Beard and it was not until after his left shoulder surgery that claimant first complained of neck pain at an office visit on September 18, 2000.<sup>6</sup> This complaint was approximately a year after claimant last performed full-duty work for respondent. Claimant then received additional treatment with Dr. Beard for several more months and again the complaints were limited to the left shoulder.

Dr. Smith concluded the cervical complaints were not related to the work activities that led to claimant seeking treatment for his left shoulder. Dr. MacMillan also concluded claimant's neck pain was not related to work activities performed up to September 23, 1999. Dr. Bieri agreed that a delay of approximately one year in reporting a symptom would make it more likely than not that the symptom was not related to the injury. Dr. Rope agreed that he did not know what work claimant was performing when he developed cervical complaints and further agreed that without knowing what work claimant was performing he could not with any degree of medical certainty form an opinion that work activity caused the cervical injury.

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<sup>3</sup> *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

<sup>4</sup> K.S.A. 44-510d(a)(13) (Furse 2000).

<sup>5</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

<sup>6</sup> As noted, Dr. Beard examined claimant's cervical spine on August 17, 2000, but the office notes indicate that examination was done to determine if there was any cervical spine problem contributing to the ongoing shoulder complaints rather than because claimant was complaining of neck pain.

The Board is not unmindful of the opinions expressed by Drs. Bieri, Rope and Curtis that claimant suffered permanent injury to his neck from his work-related injury. However, as previously noted, those doctors all based their opinions on the fact claimant suffered simultaneous injury to his neck and left shoulder before he was placed on light-duty work. But the contemporaneous medical records fail to corroborate that fact as claimant did not make complaints of neck pain for over a year. Moreover, while claimant was receiving treatment for his left shoulder Dr. Beard's medical records reflect claimant did not have other complaints and during his initial treatment the physical examinations of his neck did not elicit pain complaints.

Although claimant argued his neck injury occurred at the same time he injured his shoulder, he also argued his neck was aggravated by his light-duty work activities. But as previously noted, the medical testimony did not support that assertion because causation was attributed to the initial injury and not a subsequent aggravation or new injury. Lastly the medical records simply indicate that claimant suffers from cervical arthritis appropriate for his age.

The Board agrees with the ALJ's finding that claimant's work-related injury was limited to his left shoulder. The Board adopts the ALJ's determination that claimant's functional impairment is 17 percent to the shoulder and affirms the ALJ's Award.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 22, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director